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November 11, 2002

VIA E-MAIL & FEDERAL EXPRESS

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
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Re: D.T.E. File No. 98-57, Phase III: Covad Communications Company's
Opposition to Verizon Massachusetts' Motion for Appeal of Hearing
Officer's October 18, 2002 Ruling

Dear Ms. Cottrell:

Please accept for filing in the above-referenced proceeding the original and one copy of Covad Communications Company's Opposition to Verizon Massachusetts' Motion for Appeal of Hearing Officer's October 18, 2002 Ruling in the above-referenced proceeding. In addition, please date-stamp and return the enclosed additional copy of this filing in the envelope provided.

If you have any questions about this filing, please let us know.

Very truly yours,



Eric J. Branfman
Paul Hudson

Enclosure

cc: D.T.E. 98-57, Phase III Service List (E-mail and Paper)

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department of Telecommunications)	
and Energy, on its own motion, as to the propriety of the)	
rates and charges set forth in M.D.T.E. No. 17, filed with)	D.T.E. 98-57, Phase III
the Department on May 5, 2000 and June 14, 2000 to)	
become effective October 2, 2000 by Verizon New)	
England, Inc. d/b/a Verizon Massachusetts)	

**OPPOSITION OF COVAD COMMUNICATIONS COMPANY TO VERIZON'S
MOTION FOR APPEAL**

Covad Communications Company ("Covad") respectfully submits this opposition to Verizon's appeal of the Hearing Officer's October 18, 2002 procedural ruling in the above-captioned proceeding. The Department should reject Verizon's appeal foremost because it prematurely requests that the Commissioners prejudge and foreclose further consideration of a fact-intensive issue before fact-finding has been undertaken on the changed circumstances of Verizon's actual deployment of PARTS in Massachusetts and on CLEC' impairment without access to the related facilities. It is not an abuse of discretion for the Hearing Officer to contemplate consideration of an issue properly within the scope of the Department's purview; indeed, it is Verizon that urges an abuse of discretion by asking the Department to preclude its own fact-finders from even undertaking this analysis. However, even if Verizon's appeal is considered on its merits, the appeal merely repeats Verizon's tired and contrived arguments that the Commission should conclude that it lacks jurisdiction to implement Section 251 of the Act in the manner intended by Congress. For the reasons set forth below, Verizon's motion for appeal should be rejected.

I. Verizon's Filing of a Federal PARTS Tariff Cannot Exempt Verizon from Unbundling Obligations

The existence of a wholesale PARTS offering in Verizon's federal access tariff has absolutely no bearing on the Department's consideration of whether CLECs should have an

independent right to access PARTS or the components thereof pursuant to Section 251 of the Act. Verizon's federal tariffs set forth the services that it chooses to offer to the public at non-TELRIC rates subject only to the requirements of Section 201. Verizon's state UNE tariffs and interconnection agreements set forth the facilities and services it is required by Section 251 to offer to CLECs at cost-based rates calculated in accordance with Section 252(d)(1). These are independent regulatory schemes, and the existence of a voluntary public tariff does not exempt Verizon from the obligations to CLECs that are set forth in Sections 251 and 252. For example, Verizon offered collocation under its federal tariffs prior to the 1996 Act. That fact in no way limited the Department's authority and obligation to require Verizon to establish TELRIC-compliant collocation rates pursuant to the 1996 Act. As another example, Verizon's state-tariffed UNE transport facilities are required, under the 1996 Act, to be made available to CLECs even though the same facilities could otherwise be purchased as a service from Verizon's federal special access tariff.

Verizon's federal PARTS tariff cannot be relied upon to accomplish the objectives of Sections 251 and 252. Federal access tariffs are not reviewed under TELRIC methodology. Evidence of discrimination in Verizon's provisioning under its federal tariff is not measured by the Massachusetts Performance Assurance Plan to ensure that Verizon complies with its representation that CLECs will be able to use the tariffed PARTS service "in the same manner as Verizon MA."¹ If the Department were to rely upon the tariffed service to accomplish these objectives, it would be abdicating its responsibility to implement Sections 251 and 252 of the Act.

In a related argument, Verizon contends that the Department lacks jurisdiction over determining whether network elements used in PARTS must be unbundled because "PARTS is

an interstate offering subject to FCC jurisdiction.”² Whether or not PARTS *service* is an interstate telecommunications service when offered to the public by federal tariff is immaterial to the Department’s consideration of Verizon’s obligations to unbundle PARTS facilities for CLECs. The Hearing Officer has not proposed to review the rates, terms and conditions of Verizon’s federal tariff. Instead, the Hearing Officer proposes only that the Department determine whether an independent offering for CLECs should be required pursuant to Section 251. Many DSL services are interstate, yet Verizon is required to provide the UNE loops over which Verizon provides such services to CLECs for use in providing DSL services on rates and terms established by the Department pursuant to Sections 251 and 252 of the Federal Act. The Department has no less authority to require unbundling of network elements related to PARTS than it does in requiring Verizon to offer loops and other UNEs that are used in the provision of interstate services. Indeed, the PARTS architecture is nothing more than a loop with attached electronics. To the extent unbundled loops are available on a standalone or line-sharing basis, which they are, so too should PARTS loops. Verizon’s federal PARTS service tariff has no bearing on the Hearing Officer’s inquiry into the matter.

II. The DTE Retains its Authority to Establish Unbundling Requirements

Verizon absurdly argues that “the Department has no authority to undertake its own independent ‘impairment’ analysis to impose additional unbundling obligations on Verizon MA regarding its PARTS offering.”³ (emphasis Verizon’s). On the contrary, the Hearing Officer is clearly correct in agreeing with Covad and other parties that the Department has sufficient authority to conduct its own impairment analysis in this case.⁴ Six years late, Verizon is still

¹ Verizon Appeal at 6.

² Verizon Appeal at 7.

³ Verizon Appeal at 3.

⁴ Hearing Officer Ruling on Resuming the Procedural Schedule at 7.

attempting to rewrite the Telecommunications Act of 1996 to erase the independent authority and obligation of state commissions, established by the Act and long-recognized by the FCC, to determine and implement the ILECs' unbundling obligations.⁵ The FCC even established specific standards to be used by a state commission when "when considering whether to require the unbundling of *additional* network elements."⁶ The DTE has previously exercised this authority by requiring Verizon to unbundle dark fiber long before the FCC required it.⁷

A Department requirement to unbundle network elements related to PARTS would in no way be inconsistent with Section 251 or any FCC order. Verizon's recitation of the *UNE Remand Order* conveniently omits the FCC's finding that in some markets, "competitors may be impaired without access to incumbent LEC [DSLAM functionality]," because of practical inability to collocate their own DSLAM functionality in every central office (or, in this case, remote terminal) where the ILEC has deployed its own DSL-capable facilities.⁸ The FCC thus concluded that CLECs may indeed be impaired without access to unbundled DSLAM functionality in certain cases, but decided, "*at this time*," to refrain from imposing additional unbundling obligations because the nascency of the market prevented a complete factual determination.⁹ The framework for further consideration of this issue by state commissions was, however, clearly set forth in the Order, which concluded that "section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order (rel. Aug. 8, 1996), ¶ 136.

⁶ 47 C.F.R. § 51.317(b)(4)(emphasis added).

⁷ *New England Telephone and Telegraph Company d/b/a NYNEX*, Decision, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 48-49 (Dec. 4, 1996).

⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696, ¶ 306 (1999) ("*UNE Remand Order*").

⁹ *Id.* (emphasis added).

imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order.”¹⁰

Not only has the FCC not precluded the Department’s consideration of additional unbundling requirements, it has encouraged the Department to do so to promote advanced services competition. Subsequent to the *UNE Remand Order*, the FCC recognized that additional measures were needed to promote advanced services competition, and therefore required ILECs to provide line sharing as a new UNE. The *Line Sharing Order* further encouraged state commissions “to impose additional, pro-competitive requirements consistent with the national framework established in this order.”¹¹ The reopening of the record and resumption of the proceeding established by the Hearing Officer is therefore appropriate and necessary for the Department to exercise its obligations under the 1996 Act.

The reopening of the record is necessary to consider new facts and new focus in the Department’s inquiry. Up to now, the focus of this case has been on whether the unbundling of the PARTS architecture satisfies the FCC’s packet switching criteria as delineated in the *UNE Remand Order*. Carriers, including Covad and AT&T, therefore argued at length that Verizon’s fiber-fed loops, when deployed, would meet the FCC’s four-part criteria for unbundling packet switching. Covad still believes these criteria are met. Covad and other carriers then argued that Verizon should be obligated to “unbundle” PARTS and provide carriers the ability to collocate line cards at the remote terminal in the middle of the NGDLC architecture (where the fiber and copper portion of the loop meet).

¹⁰ *UNE Remand Order* at ¶ 154.

¹¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Third Report and Order*, 14 FCC Red. 20912, at ¶ 159 (1999) (“*Line Sharing Order*”) (vacated on other grounds).

As time has passed, and Covad has become more familiar with the NGDLC architecture underlying PARTS, it has become apparent that the most efficient means of accessing that architecture is through an end-to-end UNE. Specifically, Verizon should provide end-to-end unbundled access to fiber-fed digital loop carrier architectures, including but not limited to PARTS.

The Department deserves the opportunity to consider the end-to-end UNE fully, on the basis of a complete record addressing all factual, technical, and policy issues supporting the end-to-end UNE. In summary, the factual and legal analyses supporting such an end-to-end offering are threefold:

- First, the NGDLC architecture is nothing more than a loop with attached electronics. To the extent unbundled loops are available on a standalone or line-sharing basis, which they are, so too should PARTS loops.¹² There is therefore no need for the Department to conduct either an “impair” analysis or a “packet switching” analysis to unbundle the NGDLC loop. The packet switching criteria are inapplicable because those rules contemplate a “stand-alone” DSLAM being deployed by the ILEC, either at the remote terminal or in the central office. In the PARTS architecture, however, there is no standalone DSLAM. Instead, the system as a whole, with its attached electronics, provides the full functionality of the loop.
- Second, even if the packet switching criteria of the still effective *UNE Remand Order* apply, they are met here because Verizon is not allowing CLECs to collocate at remote terminals under the same terms and conditions as Verizon (e.g., line card collocation). Verizon has elected not to collocate stand-alone DSLAMs at its remote terminals, and instead, has opted to install line cards, which provide DSLAM functionality at the remote terminals. At the same time, Verizon has strenuously resisted allowing CLECs to collocate line cards at the remote terminal. Thus, the record in this case demonstrates that the FCC’s conditions for unbundling packet switching have been met.
- Third, even if the packet switching criteria were not met, CLECs would be impaired without access to an end-to-end UNE. There simply is no other viable economic alternative for CLECs to provide ubiquitous broadband service to Massachusetts consumers. Thus, the end-to-end UNE should be unbundled because the 1996 Act’s impair standard is met.

¹² The FCC clearly defined the parameters of a loop in its *UNE Remand Order*: “The definition of a network element is not limited to facilities, but includes features, functions, and capabilities as well. Some loops, such as integrated digital loop carrier (IDLC), are equipped with multiplexing devices, without which they cannot be used to provide service to end users.” *UNE Remand Order* ¶ 175.

To even consider these issues, the Department must permit the Hearing Officer to resume the procedural schedule in this case in accordance with the Department's rules for the development of a complete factual record for decision. Verizon has completely failed to demonstrate that the Department's consideration of these core unbundling issues would exceed the Department's obligations under the 1996 Act and its responsibility to Massachusetts consumers to promote broadband competition.

III. Conclusion

For the foregoing reasons, there is no basis to conclude that the Hearing Officer has committed any abuse of discretion. Verizon's motion for appeal must therefore be denied.

Respectfully submitted,



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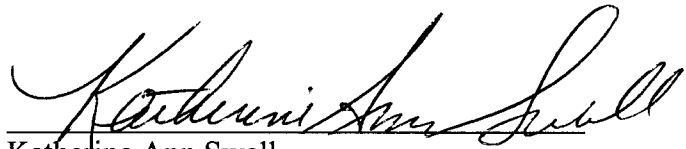
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Dated: November 11, 2002

CERTIFICATE OF SERVICE

On this 11th day of November, 2002, I hereby certify that copies of the foregoing “Covad Communications Company’s Opposition to Verizon Massachusetts’ Motion for Appeal,” as filed in Docket D.T.E. 98-57, Phase III, were sent via Federal Express** or via First-Class mail, U.S. postage prepaid, to the parties on the attached service list.


Katherine Ann Swall

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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the propriety of the rates and charges set forth in the)	
following tariffs: M.D.T.E. Nos. 14 and 17, filed with the)	D.T.E.98-57-Phase III
Department on August 27, to become effective)	
September 27, 1999, by New England Telephone and)	
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